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Sixth report on diplomatic protection

by John Dugard, Special Rapporteur

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I. Introduction

1. It has been suggested that the clean hands doctrine should be reflected in an article in the draft articles on diplomatic protection approved by the Commission in 2004. The present report considers that suggestion.

2. According to the clean hands doctrine no action arises from wilful wrongdoing: *ex dolo malo non oritur actio*. It is also reflected in the maxim *nullus commodum capere potest de injuria sua propria*. According to Sir Gerald Fitzmaurice:

> "'He who comes to equity for relief must come with clean hands'. Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality — in short were provoked by it."[1]

In the context of diplomatic protection the doctrine is invoked to preclude a State from exercising diplomatic protection if the national it seeks to protect has suffered an injury in consequence of his or her own wrongful conduct.

3. The following arguments have been raised in support of the suggestion that the clean hands doctrine should be included in the draft articles on diplomatic protection:

(a) The doctrine does not apply to disputes relating to inter-State relations where a State does not seek to protect a national;[2]

(b) The doctrine does apply to cases of diplomatic protection in which a State seeks to protect an injured national. On 5 May 2004, Alain Pellet, who supported the inclusion of a provision on clean hands, declared:

> "The vague concept of 'clean hands' was not very different from the general principle of good faith in the context of relations between States, and had no autonomous consequences and little practical effect on the general rules of international responsibility. However, in the context of diplomatic protection, which involved relations between States and individuals, the concept took on new significance: it became functional, for in the absence of 'clean hands' the exercise of diplomatic protection was paralysed. If a private individual who enjoyed diplomatic protection violated either the internal law of the Protecting [host?] State — and it should be noted that internal law played no role at all in cases involving relations between States — or international law, then in the general context of the claim, the State called upon to exercise protection could no longer do so."[3]

The doctrine produces an effect only in the context of diplomatic protection;[3]

(c) "Numerous cases" have applied the clean hands doctrine in the context of diplomatic protection. The *Ben Tillett* arbitration case is a good example;[3]

(d) Invocation of the clean hands doctrine renders a request for diplomatic protection inadmissible.[3]

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[1] (1957 II) 92 *Recueil des Cours* 119.

[2] See A/CN.4/SR.2792, pp. 17 and 18, and A/CN.4/SR.2793, p. 3.

[3] A/CN.4/SR.2793, p. 4.

4. The present report will address the above four arguments.

II. Non-applicability of the clean hands doctrine to disputes involving inter-State relations properly so called

5. It may be correct that the clean hands doctrine does not apply to disputes involving inter-State relations. However, in practice the doctrine has most frequently been raised in the context of inter-State relations where States/dissenting judges have sought to have a claim declared inadmissible or dismissed for the reason that the applicant State's hands are unclean. The following cases illustrate that practice:

(a) Most recently the argument has been raised by Israel in the advisory proceedings on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[4] In that case Israel contended:

> "That Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of 'clean hands' provide a compelling reason that should lead the court to refuse the General Assembly's request."

The Court did not consider this argument to be "pertinent" on the ground that the opinion was to be given to the General Assembly, and not to a specific State or entity. Significantly the Court did not reject the relevance of the argument to inter-State disputes in contentious proceedings;

(b) In the *Oil Platforms* case the United States of America raised an argument of a "preliminary character" in which it asked the Court to dismiss the claims of the Islamic Republic of Iran because of the latter's own unlawful conduct. The Islamic Republic of Iran categorized the argument as a "clean hands" argument, which was, so it claimed, irrelevant in direct State-to-State claims, as opposed to claims for diplomatic protection, as a ground for inadmissibility of a claim. The Islamic Republic of Iran did acknowledge that the principle might have significance at the merits stage. The Court rejected the argument that the claim of the United States was one of inadmissibility and found that it was unnecessary to deal with the request of the United States to dismiss the claim of the Islamic Republic of Iran on the basis of conduct attributed to the latter. The Court made no comment on the argument of the Islamic Republic of Iran that the clean hands doctrine might only be raised as a ground for inadmissibility of a claim in the context of diplomatic protection.[5]

(c) In *La Grand* the United States raised an argument against Germany's claim that appeared to fall into the category of clean hands. The United States contended that Germany's submissions were inadmissible on the ground that Germany sought to have a standard applied to the United States that was different from its own practice. According to the United States, Germany had not shown that

[4] See A/ES-10/273 and Corr.1.

[5] See *Case concerning the Oil Platforms*, 2003 *I.C.J. Reports*, paras. 27-30.

its system of criminal justice required the annulment of criminal convictions where there had been a breach of the duty of consular notification; and that the practice of Germany in similar cases had been to do no more than offer an apology. The United States maintained that it would be contrary to basic principles of administration of justice and equality of the parties to apply against the United States alleged rules that Germany appeared not to accept for itself. Germany denied that it was asking the United States to adhere to standards that Germany itself did not comply with. The Court found that it need not decide whether the argument of the United States, if true, would result in the inadmissibility of Germany's submissions as the evidence adduced by the United States did not justify the conclusion that Germany's own practice failed to conform to the standards it demanded from the United States;[6]

(d) An argument similar to that described above in *La Grand* was raised in *Avena*. The United States did not, however, describe it as a "clean hands" argument. Instead the objection was presented in terms of the interpretation of article 36 of the Vienna Convention on Consular Relations of 1963[7] in the sense that, according to the United States, a treaty may not be interpreted so as to impose a significantly greater burden on any one party than the other. The Court dismissed the argument, citing *La Grand*. It added that:

> "Even if it were shown, therefore, that Mexico's practice as regards the application of article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim."[8]

(e) The International Court of Justice in the *Case concerning the Gabcikovo-Nagymaros Project* declined to apply the clean hands doctrine. It stated:

> "The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.
>
> "This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law";[9]

(f) In the *Arrest Warrant* case the Belgian judge ad hoc, Judge van den Wyngaert, held that:

> "The Congo did not come to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith";[10]

(g) In the *Nicaragua* case, Judge Schwebel held that the clean hands doctrine should be applied against Nicaragua:

> "Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible — but ultimately responsible — for large

[6] See *La Grand* case, 2001 *I.C.J. Reports*, paras. 61-63.
[7] United Nations, *Treaty Series*, vol. 596, p. 261.
[8] *Case concerning Avena and Other Mexican Nationals*, 2004 *I.C.J. Reports*, paras. 45-47.
[9] 1997 *I.C.J. Reports* 76, para. 133.
[10] 2002 *I.C.J. Reports*, at para. 35.

> numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail."[11]

In support of that reasoning he cited a number of decisions of the Permanent Court of International Justice and the International Court of Justice. All of the cases cited can be labelled as direct inter-State cases;

(h) In the oral argument at the phase of both provisional measures and jurisdiction in the cases brought by Yugoslavia against members of the North Atlantic Treaty Organization concerning the *Legality of the Use of Force*, several respondents argued that the injunctions sought by Yugoslavia should not be granted because Yugoslavia did not come to Court with clean hands.

6. The above-mentioned cases make it difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations. States have frequently raised the clean hands doctrine in direct inter-State claims and in no case has the Court stated that the doctrine is irrelevant to inter-State claims.

7. While it is possible to draw a distinction between direct and indirect claims for some litigational purposes (notably in respect of the exhaustion of local remedies), it is a distinction that should be drawn with great caution as a result of the fiction that an injury to a national is an injury to the State itself. This fiction introduced by Vattel, proclaimed in the *Mavrommatis Palestine Concessions* and adopted by the Commission in the draft articles on diplomatic protection, is fundamental to an understanding of diplomatic protection. One of the cornerstones of diplomatic protection is that "once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant".[12] Surely it is not suggested that we should abandon this fiction and instead see the State in a claim for diplomatic protection as simply the agent acting on behalf of its national?

III. Applicability of the clean hands doctrine to diplomatic protection

8. If an alien is guilty of some wrongdoing in a foreign State and is as a consequence deprived of his liberty or property in accordance with due process of law by that State it is unlikely that his national State will intervene to protect him. Indeed it would be wrong for the State of nationality to intervene in such a case because no internationally unlawful act will have been committed in most circumstances. In this sense the clean hands doctrine serves to preclude diplomatic protection. The position assumes a different character, however, where an internationally wrongful act is committed by the respondent State in response to the

[11] 1986 *I.C.J. Reports* 392, at para. 268.

[12] *Mavrommatis Palestine Concessions*, 1925 *P.C.I.J. Reports*, Series A. No. 5, at p. 12.

alien's wrongful act — where for instance an alien suspected of committing a criminal offence is subjected to torture or to an unfair trial. In such a case the State of nationality may exercise diplomatic protection on behalf of the individual because of the internationally wrongful act. The clean hands doctrine cannot be applied in the latter case to the injured individual for a violation of international law, firstly, because the claim has now assumed the character of an international, State v. State claim and secondly, because the individual has no international legal personality and thus cannot (outside the field of international criminal law) be held responsible for the violation of international law. In short, as a consequence of the fiction that an injury to a national is an injury to the State itself, the claim on behalf of a national subjected to an internationally wrongful act becomes an international claim and the clean hands doctrine can be raised against the protecting State only for its conduct and not against the injured individual for misconduct that may have preceded the internationally wrongful act.

9. As a consequence of the above reasoning it follows that the clean hands doctrine has no special place in claims involving diplomatic protection. If the individual commits an unlawful act in the host State and is tried and punished in accordance with due process of law, no internationally wrongful act occurs and the unclean hands doctrine is irrelevant. If, on the other hand, the national's misconduct under domestic law gives rise to a wrong under international law as a result of the respondent State's treatment of the national's misconduct, the claim becomes international if the injured national's State exercises diplomatic protection on his behalf. Then the clean hands doctrine may only be raised against the plaintiff State for its own conduct. This is illustrated by the *La Grand* and *Avena* cases. In both cases foreign nationals committed serious crimes, which warranted their trial and punishment, but in both cases the United States violated international law in respect of their prosecution by failing to grant them consular access. At no stage did the United States argue that the serious nature of their crimes rendered the hands of the foreign nationals unclean, thereby precluding Germany and Mexico respectively from protecting them under the Vienna Convention on Consular Relations. On the contrary, in both cases (as has been shown above) the United States contended that the plaintiff States themselves had unclean hands by virtue of their failure to apply the Vienna Convention in the manner required of the United States.

IV. Cases of application of the clean hands doctrine in the context of diplomatic protection

10. Unlike cases involving direct inter-State claims in which the clean hands doctrine has been frequently raised, the cases involving diplomatic protection in which the doctrine has been raised are few.

11. The cases relied upon by some authors are the *Ben Tillett* arbitration and the *Virginius*. Carreau cites there two incidents as examples to support his statement that "l'individu pour qui l'État exerce ou prétend exercer sa protection diplomatique ne doit pas lui-même avoir eu une 'conduite blâmable'."[13] A close consideration of *Ben Tillett* and *Virginius* reveals that neither of them has anything to do with the clean hands doctrine, nor do they employ the language of the doctrine.

[13] Dominique Carreau, *Droit international*, 7th ed. (2001), pp. 467 and 468.

12. Firstly, the *Ben Tillett* case.[14] On 21 August 1896, Ben Tillett, a British national and a labour union activist, arrived in Belgium to participate in a meeting of dock workers. The day he arrived in Belgium, he was arrested, detained for several hours and deported back to the United Kingdom. The latter, claiming on behalf of Ben Tillett, argued that Belgium had violated its own law and demanded monetary compensation of 75,000 francs. After negotiations failed, the case was decided by an arbitrator. It is clear from the text of the arbitration agreement between Belgium and the United Kingdom, as well as from the arbitral award, that the issue of inadmissibility of diplomatic protection was not even considered. The United Kingdom undoubtedly exercised diplomatic protection on behalf of Ben Tillett. It lost the case on substantive grounds, the main reason being that the act committed by Belgium was not an internationally wrongful act (contrary to Carreau's interpretation, who states that "l'arbitre débouta la Grande-Bretagne en raison de la violation par Ben Tillett du droit belge. En bref, il n'avait pas les 'mains propres'.").

13. Secondly, the case of the *Virginius*.[15] On 31 October 1873, the steamer *Virginius* was captured by a Spanish man-of-war on the high seas. *Virginius*, which flew an American flag (as later determined, without a right to fly it), carried arms, ammunition and potential rebels destined for Cuba. *Virginius* was taken to Santiago de Cuba, where 53 persons out of 155 crew members and passengers were summarily condemned for piracy by court-martial and executed. Among the executed persons were nationals of the United States and the United Kingdom. It is clear from the documents produced during negotiations between Spain and the United States that there was no disagreement between the parties involved about the right of the United States to exercise diplomatic protection in this particular situation. Also both countries agreed that Spain was responsible for a violation of international law regardless of whether *Virginius* rightfully flew the United States flag and was engaged in transporting military supplies and potential rebels to Cuba. The case was not referred to arbitration as Spain paid compensation to both the United States and the United Kingdom for the families of the executed American and British nationals.

14. Several writers express support for the clean hands doctrine in the context of diplomatic protection, but they offer no authority to support their views.[16] Cheng does, however, cite the *Clark Claim* of 1862, in which the American Commissioner disallowed the claim on behalf of an American national in asking: "Can he be allowed, so far as the United States are concerned, to profit by his own wrong? ... A party who asks for redress must present himself with clean hands."[17]

[14] See *Revue générale de droit international public*, vol. 6, No. 46 (1899).

[15] John Bassett Moore, *A Digest of International Law* (Washington, D.C., United States Government Printing Office, 1906), vol. 2, p. 895.

[16] David Ruzié, *Droit international public*, 14th ed. (1999), p. 95; Jean Combacau and Serge Sur, *Droit international public*, 5th ed. (2001), pp. 596 and 597; and Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th revised ed. (1997), pp. 263-269.

[17] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 155.

15. Many writers are sceptical about the clean hands doctrine and the weight of authority to support it (see, in particular, the views of Salmon,[18] Rousseau[19] and Garcia Arias).[20] Rousseau's views are of special importance. He states: "Il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier général, à la différence des autres causes d'irrecevabilité à l'étude desquelles on arrive maintenant."[21]

V. A plea to admissibility?

16. On occasion an argument premised on the clean hands doctrine has been raised as a preliminary point in direct inter-State cases before the International Court of Justice. It is not clear, however, whether the intention has been to raise the matter as a plea to admissibility. If the doctrine is applicable to claims relating to diplomatic protection it would seem that the doctrine would more appropriately be raised at the merits stage as it relates to attenuation or exoneration of responsibility rather than to admissibility.

VI. Concluding remarks

17. In paragraph 330 of his second report on State responsibility,[22] James Crawford suggested that the defence of clean hands was raised "mostly, though not always, in the framework of diplomatic protection". He added:

> "Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of 'clean hands', whether as a ground of admissibility or otherwise, is, in Salmon's words, 'fairly long-standing and divided'.[23] It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible: 'In any event, it appears that these cases are all characterized by the fact that the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State. When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible.'"[24]

18. The present report has shown that the evidence in favour of the clean hands doctrine is inconclusive. Arguments premised on the doctrine are regularly raised in

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[18] "Des 'mains propres' comme condition de recevabilité des réclamations internationales," *Annuaire français de droit international* (1964), pp. 225-266, and Jean Salmon, *Dictionnaire de droit international public* (2001), pp. 677 and 678.

[19] *Droit international public*, vol. 5, 1983, p. 172.

[20] "La doctrine des 'clean hands' en droit international public", *Annuaire des anciens auditeurs de l'Académie de droit international* (160), pp. 14-22.

[21] *Droit international public*, vol. 5, 1983, at p. 177.

[22] A/CN.4/498/Add.2.

[23] Supra note 18 at p. 249.

[24] Supra note 18 at p. 261.

direct inter-State cases before the International Court of Justice, but they have yet to be upheld. Whether the doctrine is applicable at all to claims involving diplomatic protection is highly questionable. There is no clear authority to support the applicability of the doctrine to cases of diplomatic protection. Such authority as there is is uncertain and of ancient vintage, dating mainly from the mid-nineteenth century — as the above-cited passages from Salmon demonstrate. Although some authors support the existence of the doctrine in the context of diplomatic protection, they are unsupported by authority. Moreover there are strong voices — Salmon and Rousseau — against such a doctrine. In these circumstances the Special Rapporteur sees no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection.